No. 187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Claims

SUPPLEMENTAL REPLY BRIEF OF THE MENOMINEE TRIBE

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The opinion of the Court of Claims below is now reported at 388 F.2d 998.

In its brief filed April 5, 1968, the State of Wisconsin made several points which warrant reply. At p. 4, Wisconsin says that the Menominee Termination Act contains no reservation of hunting and fishing rights or privileges in favor of the Indians, and that the stated purpose of the Act was to subject the Menominees to the same laws, privileges and responsibilities as are applicable to all oth-

er citizens. This is true, of course. But there was no affirmative conveyance of non-trust property, either; and beyond that, Congress was authoritatively told—by the drafters of the bill—that the bill would not impair Menominee treaty rights,[1] and indeed, Senator Watkins, the father of the bill, said upon the occasion of the signing of the bill, that[2]

> "The bill in no way violates any treaty obligation with this tribe."

The Klamath Termination Act has been held by both state and federal courts not to have cut off the Klamath treaty hunting rights.[3] The same exception was intended in the Menominee Act.

Wisconsin relies (pp. 19-20) on the declaration of the Tribe's attorney, Mr. Wilkinson, to the joint committee, that the bill would abrogate the hunting and fishing rights. This declaration was indeed made,[4] but its purpose was to urge Congress to expressly save the rights, in order to avoid the uncertainly which could (and did) lead to extensive litigation. Furthermore, it was authoritatively superseded by the drafters of the bill, the officials of the Interior Department, who said that the bill would *not* abrogate any treaty rights.[5] That the committee accepted the Interior Department's view is shown by Sena-

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[1] See our main brief of November 24, 1967 (Pet. Main Br.) at pp. 22-23.

[2] 100 Cong. Rec. 8538 (1954).

[3] *Klamath & Modoc Tribes* v. *Maison* (D.Ore. 1963) (unpublished; reprinted in the appendix to the petition for certiorari, p. 74; *aff'd on other grounds*, 338 F.2d 620 (9th Cir. 1964)), and *State* v. *Pearson* (Klamath County District Court, 1961) (unpublished; reprinted in the appendix to the petition for certiorari, p. 70).

[4] As we noted, Pet. Main Br. 23.

[5] Id. at 22-23, and see our supplemental brief of April 9, 1968 (Pet. Supp. Br.) at p. 21-22.

tor Watkins' declaration, quoted above at note 2, that the bill in no way violated any treaty rights.

At pp. 7-9, Wisconsin asserts that Congress has the power to abrogate Indian treaty rights. We concede this, but we say that Congress had no intention in this case of abrogating any treaty rights. Even if its intent were unclear, the rule of statutory construction with respect to Indians is that a treaty right will not be presumed to be abrogated sub silentio.[6]

At pp. 35-40, Wisconsin discusses the Klamath Termination Act and the cases decided thereunder. Wisconsin states (p. 35) that the 1956 Klamath case in the U.S. District Court[7] did not mention the Klamath Termination Act. This is true; we cited that particular case in our main brief only for the proposition that the Klamaths had a treaty right to hunt, even though the Klamath treaty did not expressly mention hunting. It was not until the *second* phase of that case in 1963 that the court held that that treaty hunting right survived the Termination Act.[8]

The Klamath Termination Act gave the tribal members an option to withdraw from the tribe and be paid the value of their pro rata share of the tribal estate.[9] Pursuant to this option, almost 80% of the tribe's members withdrew, and received over $40,000 each. The payoff funds were made available by the United States purchasing from the tribe so much of the reservation (which was valuable forest land) as was necessary to pay off all of the withdrawing members. The land so purchased by the United States was placed into the Winema National Forest, leaving only a part of the former reservation still

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[6] See *Squire* v. *Capoeman*, 351 U.S. 1 (1956), and other cases cited Pet. Main Br. 21.

[7] *Klamath & Modoc Tribes* v. *Maison*, 139 F.Supp. 643 (D.Ore. 1956).

[8] Unpublished, see citation at note 3 above.

[9] 25 U.S.C. § 564d(a)(2).

in tribal ownership. In 1961 these remaining tribal lands were transferred from the United States as trustee for the tribe, to the United States National Bank of Portland, as trustee for the tribe.

In the 1963 phase of the Klamath case, the U.S. District Court held that notwithstanding the Klamath Termination Act, the remaining members had a right to hunt on the lands which still remained in tribal ownership.[10] The court also held that the tribe's hunting rights had been cut off as to the tribal lands purchased by the United States.

The latter point—that the hunting rights had been cut off as to lands purchased by the United States—was appealed to the Ninth Circuit by the tribe.[11] The Ninth Circuit affirmed, agreeing with the District Court that the hunting rights had been cut off as to the lands no longer owned by the tribe. It was in this context that the court made the statements quoted at length by Wisconsin at pp. 37-39.

We note that the Ninth Circuit had before it the views of the United States, appearing as amicus curiae[12] (which views the United States no longer subscribes to). The United States expressly referred to the memorandum which it filed in this Court[13] upon the occasion of our petition for certiorari from the Wisconsin Supreme Court's decision in the initial phase of the instant case. The tone of the Government's memorandum in *Klamath*, as in *Sanapaw*, was distinctly hostile to any claims by the

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[10] Or more accurately, the land which the tribe still owned beneficially, though the trustee had changed from the United States to the United States National Bank of Portland.

[11] 338 F.2d 620 (1964).

[12] Memorandum for the United States as Amicus Curiae, 9th Cir. No. 19231 (July, 1964).

[13] Memorandum for the United States, *Sanapaw* v. *Wisconsin*, No. 930, O.T. 1963 (June, 1964).

Indians of surviving hunting and fishing rights. It presented in *Klamath*, as in *Sanapaw* the totally erroneous theory that the basis for the Klamath hunting rights was the simple immunity of the Klamath Tribe to state laws on the reservation prior to termination. Therefore, its theory went, since the Termination Act extended state laws into the reservation, there was no longer a basis for the immunity for the hunting activities. This theory, patently little thought-through and erroneous, has been rejected expressly or by implication by the three Klamath decisions [14] and the three Menominee decisions.[15] The Government has now quite properly withdrawn its adherence to such a theory.

It is impossible to say to what extent this amicus brief by the United States was influential in the decision reached by the Ninth Circuit. The Ninth Circuit quoted the amicus brief, and stated that it was in agreement with the position expressed in that brief (i.e., that the Klamaths should no longer be "specially treated"). See Wisconsin's brief p. 38.

We do not want to leave the discussion of the Ninth Circuit decision in the Klamath case without expressing our strong disagreement with the conclusion reached by that court. In our opinion, the United States could not abolish the Klamath hunting and fishing rights simply by acquiring the tribal lands and putting them into a National forest. We think the *Winans* and *Seufert* cases apply here, to the effect that the hunting and fishing rights survived the transfer of the land from the tribe to the United States.[16]

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[14] Notes 3 and 7 above.

[15] Trial court's decision in the *Sanapaw* case, App. 36; Wisconsin Supreme Court's decision in the same case, App. 51; and the decision of the Court of Claims below, App. 5.

[16] *United States* v. *Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919). These cases held that the Indians' fishing rights on certain land outside the reservation con-

At pp. 42-43, Wisconsin says it cannot seriously be claimed that the hunting and fishing rights will attach to all lands and waters within the former reservation. But we claim exactly that. Neither this treaty, nor any other to our knowledge, provided for termination of the rights whenever the land left tribal or federal ownership. The *Winans* and *Seufert* cases (note 16 above) recognized that the rights continued in the original geographic situs even as to lands patented to white landowners with no express reservation of the rights.

At pp. 40-41, Wisconsin states that after it became a State in 1846, the Menominees ceded all their interest in Wisconsin in 1848, and therefore, the jurisdiction and sovereignty of Wisconsin attached to the lands involved herein. We are not certain what Wisconsin's point is. If it is suggesting that the later setting aside of the Menominee Reservation in 1854 did not oust the state's jurisdiction, or that somehow tribal-federal jurisdiction was less complete than on ordinary reservations, we would disagree: (1) The treaty was, under the Constitution, the "supreme law of the land," and rights protected under it would not be lost due to the possible hiatus in the Tribe's title to its land; (2) The Menomines only conditionally ceded their Wisconsin lands and agreed to move out, and when the condition (i.e. adequate hunting and fishing resources on the new lands) was not satisfied, the cession was rescinded, and their acquisition of the Wolf River Reservation related back to 1848, so that they never lost title; and (3) in 1853 the Wisconsin legislature *consented* to the setting aside of the 1854 reservation,[17] which constituted a retrocession of jurisdiction to the federal government and the tribe, just as it existed prior to statehood.

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tinued even after that land had been patented by the United States to white landowners, without any reservation of the rights. In *Winans* the situs was within the tribe's aboriginal territory, which it had ceded to the United States, but in *Seufert* the situs was outside the tribe's aboriginal boundaries.

[17] The resolution is quoted at Pet. Main Br. 6, n. 6.

At p. 42 Wisconsin says the problem of identification of those entitled to exercise of rights would be "nearly insurmountable." We do not see any problem at all. The Tribe has provided for an annual updating of its membership roll.[18] and this roll would be the basis for personal membership cards to be issued by the Tribe, which could be displayed to the game warden upon challenge.

In its memorandum to this Court dated January 19, 1968, Wisconsin relied on and quoted from *Ward* v. *Race Horse.*[19] It does not repeat its reliance in its brief of April 5, but in case any question remains, it may be noted that this case, the first one decided by this Court on Indian hunting and fishing rights, is of little value here for two reasons—first, it dealt with off-reservation hunting and fishing rights, i.e., rights on lands owned by non-Indians outside the reservation, whereas the instant case involves rights on lands within the former reservation and still Indian-owned for all practical purposes. Secondly, *Ward* v. *Race Horse* has been modified by this Court; whereas the *Race Horse* opinion held that the mere admission of the State into the Union abrogated off-reservation treaty hunting rights, this Court has since held that

[18] Resolution No. 1, Pet. Supp. Br. B18.

[19] 163 U.S. 504 (1896).

this is not so, both as to private interference,[20] and at least to some extent as to state interference.[21]

Respectfully submitted,

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April 19, 1968

[20] See the *Winans* and *Seufert* cases, note 16 above.

[21] *Tulee* v. *Washington*, 315 U.S. 618 (1942), and see interpretations of *Tulee* by the Ninth Circuit, *Holcomb* v. *Confederated Tribes*, 382 F.2d 1013 (9th Cir. 1967), and related cases cited and discussed in our reply brief filed January 15, 1968, at p. 2. See the analysis of *Race Horse* in *State* v. *Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert. den., 347 U.S. 397.